



DEPARTMENT OF HEALTH AND HUMAN SERVICES

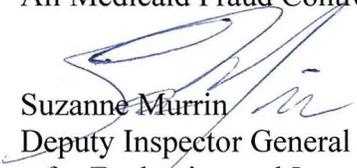
# OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



OCT 23 2014

TO: All Medicaid Fraud Control Unit Directors

FROM:   
Suzanne Murrin  
Deputy Inspector General  
for Evaluation and Inspections

SUBJECT: State Fraud Policy Transmittal No. 2014-2  
Plea Negotiations and the Definition of Convictions; Reporting Convictions  
for Exclusion Purposes

This transmittal updates and replaces State Fraud Policy Transmittal 90-1 (August 6, 1990) by providing guidance on two topics relating to the Federal exclusion law and the reporting of convictions by Medicaid Fraud Control Units (MFCUs or Units). Specifically, as set out more fully below, this transmittal (1) requests that MFCU and other prosecutors avoid accepting “deferred prosecutions” designed to avoid the reach of the Federal exclusion law, and (2) clarifies, consistent with the applicable performance standard, that MFCUs should report *all* convictions to the Office of Inspector General (OIG) for exclusion purposes, regardless of whether the MFCU believes that the underlying offense is “excludable.”

The 1990 transmittal also addressed two other items that are related to the reporting of statistical information to OIG: (1) deferred prosecutions should not be counted as convictions for purposes of a Unit’s annual statistical report, and (2) convictions of multiple counts in the same proceeding should be treated as a single conviction for reporting purposes. Both of these items are included as part of the instructions recently provided to you for purposes of preparing the MFCU Annual Statistical Report.

## Background

Section 1128 of the Social Security Act, 42 U.S.C. 1320a-7, establishes the situations in which OIG will exclude individuals and entities from participation in Medicare, Medicaid, and all Federal health care programs. Most significant for the MFCUs are “mandatory exclusions,” required by section 1128(a)(1) through (a)(4) of the Act, under which OIG will exclude an individual or entity convicted of program-related crimes, patient abuse, and felony convictions relating to health care or to controlled substances.

Under section 1128(b)(1) through (b)(16),OIG also has “permissive” exclusion authority to exclude for various other reasons, including a misdemeanor conviction for fraud ((b)(1)), license revocation or suspension ((b)(4)), a State-imposed exclusion or suspension ((b)(5)), and a failure to grant OIG or a MFCU immediate access to records necessary to the performance of their duties ((b)(12)). Provider convictions by MFCUs are a major source for the mandatory exclusions imposed each year by OIG. For this reason, MFCU performance standards require that conviction information be promptly reported to OIG exclusion staff. The current standards—*Performance Standards for State Medicaid Fraud Control Units* (77 Fed. Reg. 32645, June 1, 2012)—state in Standard 8.F that MFCUs should transmit to OIG “all pertinent information on MFCU convictions within 30 days of sentencing, including charging documents, plea agreements, and sentencing orders.”

### Plea Negotiations and the Definition of Convictions

Because of the assortment of Federal, State, and local court practices relating to plea agreements, the meaning of “convicted” is specifically defined in section 1128(i) of the Social Security Act as follows:

- (i) Convicted Defined.—For purposes of subsections (a) and (b) of this section, an individual or entity is considered to have been “convicted” of a criminal offense—
  - (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
  - (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
  - (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
  - (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

As also stated in the 1990 transmittal, OIG continues to have concerns—in connection with subsection (4) of the definition—about situations in which defendants, as part of plea negotiations, have had the charges against them dropped before a plea has been accepted in court. This practice is commonly known as a “deferred prosecution,” and is distinguished from a “deferred adjudication” or “pre-trial diversion,” in which a judge, based upon the mutual agreement of the parties, “defers” judgment after acceptance of a plea.

Deferred prosecutions, on the other hand, avoid the formality of acceptance of a plea, and may be employed by the defense bar for the purpose of avoiding, for their clients, the reach of the Federal exclusion law. While we believe that deferred prosecutions are similar to deferred

adjudications as a reflection of culpability, deferred prosecutions are outside the reach of the Federal exclusion law's definition of a conviction. See *Travers v. Shalala*, 20 F. 3d 993 (9th Cir. 1994), in which a defendant's exclusion was upheld on appeal as he was found to have participated in a "deferred adjudication" or "first offender" program, rather than a deferred prosecution.

This transmittal reiterates our earlier guidance that Unit prosecutors (or other prosecutors bringing cases investigated by the MFCU) should avoid accepting deferred prosecutions, as deferred prosecutions function as a means of avoiding the effect of OIG exclusion. Exclusions are a critical tool in protecting the Medicare and Medicaid programs from unscrupulous providers, and prosecutors should not accept plea arrangements designed to thwart those protections.

We have also revised the instructions for MFCU statistical reports to clarify that Units, in submitting their statistical reports and in other submissions to OIG, should not treat a deferred prosecution as a conviction for statistical purposes. If OIG cannot use the State's action as a basis for exclusion, then the action will not be considered as a conviction.

#### Reporting Convictions for Exclusion Purposes

To be consistent with the current performance standard, Units should ensure that they report to OIG pertinent information on *all* convictions—not only those which the Unit understands to be "excludable" convictions. As we have earlier explained in informal guidance to the Units, OIG will make the determination of whether to exclude an individual or entity after considering all the circumstances in a particular case. The decision on whether to exclude an individual or entity has significant consequences, and OIG has the responsibility to make that decision after weighing the legal and policy concerns in light of the evidence.

OIG recognizes that MFCUs can face difficulties in making timely reports of conviction information when non-MFCU prosecutors, particularly local prosecutors, are responsible for the prosecution of MFCU-investigated cases. In such cases, the Unit should make its best effort to obtain court documents following sentencing in a timely manner. One way to do so may be to communicate to the prosecutor, at the time a case is presented, that OIG expects MFCUs to refer convictions within 30 days of sentencing.

This transmittal is effective on the date of issuance. If you have any questions, please contact Richard Stern, Director, Medicaid Fraud Policy and Oversight Division, at (202) 619-0480.